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Loss of United States Citizenship: Fourteenth Amendment Limitations on Congressionally Mandated Expatriation, *Vance v. Terrazas*, 444 U.S. 252 (1980)

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NOTE

Loss of United States Citizenship: Fourteenth Amendment Limitations on Congressionally Mandated Expatriation

Vance v. Terrazas
444 U.S. 252 (1980)

Laurence J. Terrazas, a citizen of both the United States and Mexico at birth, obtained a certificate of Mexican citizenship upon execution of a Mexican government form in which he both swore allegiance to Mexico and expressly renounced his United States citizenship.[1] Shortly thereafter, the Department of State issued a certificate of loss of nationality and, after a full hearing, the Board of Appellate Review of the Department affirmed the conclusion that Terrazas had voluntarily renounced his citizenship.[2] In an action for a declaratory determination of Terrazas's nationality, the United States District Court for the Northern District of Illinois concluded that the government had proven, by a preponderance of the evidence, that citizenship had been voluntarily relinquished pursuant to § 349(a)(2) of the Immigration and Nationality Act of 1952.[3] The United States Court of Appeals for the Seventh Circuit reversed, holding that for expatriation the fourteenth amendment requires the government to prove by clear and convincing evidence that an individual has relinquished voluntarily his citizenship.[4] On appeal, the Supreme Court, in a 5-4 decision,[5] *held,* reversed and remanded: (1) the government must prove specific intent to surrender United States citizenship and not simply the voluntary commission of an expatriating act;[6] (2) Congress, acting within its constitutional powers, is free to prescribe a preponderance of the evidence standard of proof;[7] and

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1. Vance v. Terrazas, 444 U.S. 252 (1980).
2. *Id.* at 255.
3. *Id.* The relevant statutory language of § 439(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481(a)(2) 1970 is set forth in the opinion. *Id.* at 254.
4. Terrazas v. Vance, 577 F.2d 7, 12 (7th Cir. 1978).
5. Justice White delivered the opinion of the Court, joined by Justices Burger, Blackmun, Powell, and Rehnquist. Justices Marshall and Stevens filed opinions concurring in part (with the first section of the majority opinion) and dissenting in part (with the final two sections of the majority opinion). Justice Brennan filed a dissenting opinion, in Part II of which Justice Stewart joined.
6. 444 U.S. at 263.
7. *Id.* at 266.

(3) the rebuttable presumption that an act of expatriation was voluntary is not constitutionally infirm.[8] *Vance v. Terrazas*, 444 U.S. 252 (1980).

In *Vance v. Terrazas* the Supreme Court has reaffirmed, clarified, and enlarged its position taken thirteen years earlier in the landmark decision of *Afroyim v. Rusk*.[9] There, the Court asserted that "Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit."[10] Before discussing the impact of *Terrazas*, however, it is necessary to review more carefully the factual setting. Following will be an examination of the relevant decisions, including *Afroyim*, as reflections of the changing legal climate leading up to the holding in *Terrazas*. This note will conclude with an analysis of the Court's decision and the resultant implications for the future.

I. The Facts of *Vance v. Terrazas*

Terrazas, the son of a Mexican citizen, was born in the United States. In the fall of 1970, at the age of twenty-two and while a student in Monterrey, Mexico, he executed an application for a certificate of Mexican nationality, swearing "adherence, obedience, and submission to the laws and authorities of the Mexican Republic" and "expressly renounc[ing] United States citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of the United States of America. . . ."[11] The certificate, issued in April of 1971, recited that Terrazas "has expressly renounced all rights inherent to any other nationality, as well as all submission, obedience, and loyalty to any foreign government, especially to those which have recognized him as their national."[12] The

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8. *Id.* at 269-70.
9. 387 U.S. 253 (1967).
10. *Id.* at 262.
11. 444 U.S. at 255-56 (citing to appendix of Brief for Appellant 5a). The application contained the following statement: "I therefore hereby expressly renounce _____ citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of _____, of which I might have been subject, all protection foreign to the laws and authorities of Mexico, all rights which treaties or international law grant to foreigners; and furthermore I swear adherence, obedience, and submission to the laws and authorities of the Mexican Republic." *Id.* The blank spaces in the statement were filled in with the words "Estados Unidos" (United States) and "Norteamerica" (North America). Mexicans and other Latin Americans commonly refer to the United States as "North America."
12. *Id.* (citing to appendix to Brief for Appellant 8a).

Court noted that Terrazas had read and understood the certificate upon receipt.[13]

Later, following a discussion with an officer of the United States Consulate in Monterrey, proceedings were instituted to determine whether Terrazas had lost his United States citizenship by obtaining the certificate of Mexican nationality. Although Terrazas denied that he had relinquished his citizenship, in December 1971 the Department of State nevertheless issued a certificate of loss of nationality. After a full hearing in which the Board of Appellate Review of the Department of State affirmed the Department's findings, Terrazas brought suit, as permitted by § 360(a) of the Immigration and Nationality Act of 1952 (hereinafter Act),[14] against the Secretary of State for a declaration of his United States nationality.[15]

The district court first examined § 349(a)(2) of the Act, which provided that "a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by . . . taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof."[16] It was also noted that the party claiming the loss of citizenship must establish such claim by a preponderance of the evidence and that there is a rebuttable presumption as to the voluntariness of the expatriating conduct.[17] Thus, the court concluded, since the United States had proven by a preponderance of the evidence that Terrazas had knowingly and voluntarily taken an oath of allegiance to Mexico, he had, therefore, voluntarily relinquished his United States citizenship.[18]

The court of appeals reversed, finding that in addition to proving the taking of an oath to a foreign state, the government must establish, by clear, convincing and unequivocal evidence, an intent to renounce one's United States citizenship. "A clear, convincing and unequivocal evidence standard is the minimum burden of proof that can satisfactorily guarantee that the individual's interest in the retention

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13. *Id.*

14. 8 U.S.C. § 1503(a) (1970) provides that, "If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department . . . upon the ground that he is not a national of the United States, such person may institute an action . . . against the head of such department . . . for a judgment declaring him to be a national of the United States . . . ."

15. 444 U.S. at 256.

16. 8 U.S.C. § 1481(a)(2) (1970).

17. 8 U.S.C. § 1481(c) (1970).

18. 444 U.S. at 256-7.

of his citizenship is protected adequately."[19] The court thus rejected the district court's assertion that "the declaration of allegiance to a foreign state in conjunction with the renunciatory language of United States citizenship 'would leave no room for ambiguity as to the intent of the applicant.' "[20]

II. The Historical-Legal Background: Changing Interpretation of the Citizenship Clause of the Fourteenth Amendment

The doctrine of indelible allegiance, under which no person could, of his own volition, terminate allegiance to the United States without the consent of the government, was adhered to prior to the Civil War.[21] In 1868, however, Congress recognized that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness."[22]

Perhaps of greatest importance in this early period was the enactment of the fourteenth amendment. The first sentence of the fourteenth amendment, which has become the most significant provision of the Constitution pertaining to citizenship, reads: "All persons

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19. Terrazas v. Vance, 577 F.2d 7 (1978). The Court of Appeals, in prescribing a clear and convincing standard of proof, may have been influenced by one important fact which the Supreme Court failed to mention in its subsequent decision. In his application for registration, Terrazas drafted three separate statements. On one form, he responded "no" to the questions: "Did you intend by this oath, or affirmation, to abandon your allegiance to the United States, or transfer your allegiance to the foreign state?" *Id.* at 9. In another statement, Terrazas acknowledged that he felt "more Mexican than American," but nevertheless said that "by taking this oath I did not consider that I was relinquishing my rights as an American citizen." *Id.* And in yet another statement submitted that same day, he stated, contrary to his other two statements, that he took the oath "with the intention of relinquishing my United States citizenship." *Id.* Thus, as the Court of Appeals emphasized, there existed considerable doubt as to Terrazas' true intent.

20. 444 U.S. at 257 (citing to the District Court's reliance on the language of United States v. Matheson, 400 F. Supp. 1241, 1245 (S.D.N.Y. 1975), *aff'd* 532 F.2d 809 (2nd Cir. 1976), *cert. denied*, 429 U.S. 823 (1976).

21. The classic statement of the doctrine of indelible allegiance is found in Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 246 (1830).

22. Act of July 27, 1868, ch. 249, 15 Stat. 223 (1868) (cited in, Schwartz, *American Citizenship After Afroyim and Bellei: Continuing Controversy*, 2 HASTINGS CONST. L.Q. 1003, 1004 (1974-75) (hereinafter referred to as *Schwartz*). A foreshadowing of the 1868 Act is found in the language of the Act of March 3, 1865, ch. 79, § 21, 13 Stat. 490, which provided that desertion from military service and flight to avoid conscription were acts indicating the intention "to have voluntarily relinquished and forfeited . . . rights of citizenship." *Id.* at 1004 n.6.

born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[23] Clearly, this language suggests that it is not within Congress' power to remove an individual's citizenship. Until *Afroyim v. Rusk*,[24] however, the fourteenth amendment played no significant role in the controversy over citizenship, for the citizenship clause's absolute language was seen as incompatible with what courts had come to view as compelling governmental interests necessitating denationalization.[25]

In the 1958 decision of *Perez v. Brownell*,[26] the Supreme Court heard the case of a natural born citizen who the government had attempted to deport, pursuant to § 401 of the Nationality Act of 1940,[27] on the grounds that he had voluntarily relinquished his citizenship by remaining outside the United States to avoid service in the military and by voting in political elections in Mexico. The fundamental issue before the Court was whether Congress could, consistent with the fourteenth amendment, enact a law stripping an individual of his American citizenship which he had never voluntarily renounced. The Court rejected the contention that the citizenship clause restricted the government's power to remove citizenship, reasoning that Congress' implied power to deal with foreign affairs as an indispensable attribute of sovereignty, coupled with the necessary and proper clause,[28] empowers Congress to regulate voting by American citizens in foreign elections; thus, involuntary expatriation is within the scope of appropriate modes Congress can adopt to ef-

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23. U.S. CONST., amend. XVI, § 1. The fourteenth amendment formally adopted the *jus soli* method of determining citizenship. According to the theory of *jus soli*, birth in the United States creates citizenship regardless of the parents' allegiance. *See United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

24. 387 U.S. 253 (1967).

25. The circumstances surrounding the enactment of the fourteenth amendment also serve to explain its early insignificant role in the citizenship controversy. In the landmark decision of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), the Supreme Court found that blacks were not citizens of the United States and that Congress could not employ its apparently plenary power to alter their status as aliens. Thus, in reaction to this decision and subsequent events leading up to and through the Civil War, the fourteenth amendment was enacted, its chief purpose being the protection of Black Americans. It was not until almost a century later that the Supreme Court came to read the fourteenth amendment broadly.

26. 356 U.S. 44 (1958).

27. 54 Stat. 1137 (1940), *as amended by* the Act of September 27, 1944, 58 Stat. 74(b) (1944) § 401, was incorporated into § 349 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481.

28. U.S. CONST. ART. I, § 8, cl. 18.

fecuate its general regulatory power.[29] The *Perez* majority specifically rejected the "notion that the power of Congress to terminate citizenship depends upon the citizen's assent."[30]

The significance of *Perez* may not, however, lie in the majority holding. Of particular significance is Chief Justice Warren's dissent objecting to the traditional American theory of congressional power over citizenship. Citing in support the fourteenth amendment and relevant language from the landmark decision of *Osborn v. Bank of the United States*,[31] Warren, speaking for himself and the three other dissenters, contended that "whatever may be the scope of its powers to regulate the conduct and affairs of all persons within its jurisdiction, a government of the people cannot take away their citizenship simply because . . . that government can be said to have a conceivably rational basis for wanting to do so."[32]

Warren's thought was echoed in the cases of *Trop v. Dulles*[33] and *Nishikawa v. Dulles*,[34] both decided on the same day as *Perez*. Justice Brennan was the mobile member of the Court that day, voting with the majority against Perez and then voting with the *Perez* dissenters to provide a majority against the government in *Trop*.

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29. 356 U.S. at 57-60. The *Perez* court relied heavily on Mackenzie v. Hare, 239 U.S. 299 (1915), and Savorgan v. United States, 338 U.S. 491 (1950). In *MacKenzie*, the plaintiff, a native-born citizen and resident of the United States, married a subject of Great Britain and continued to reside with her husband in the United States. The Court stripped her of her citizenship, citing as reasons the potential for embarrassment of the government, national complications, international policy, etc. 239 U.S. at 312. In *Savorgan*, the plaintiff, a native-born American citizen, voluntarily obtained Italian citizenship while in the United States through naturalization in accordance with Italian law. She then lived in Italy with her Italian husband for a period of four years before returning to the United States. The Supreme Court found that she had thus expatriated herself. In neither *MacKenzie* nor *Savorgan*, the *Perez* court noted, had either plaintiff intended to renounce American citizenship. 356 U.S. at 61.

30. *Id.* at 60.

31. 24 U.S. (9 Wheat.) 738 (1824). "[The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." *Id.* at 827.

32. 356 U.S. at 65 (Warren, C.J., dissenting). It is important to note that the Chief Justice did say, 356 U.S. at 66, that naturalization unlawfully procured can be set aside. *See, e.g.*, Knauer v. United States, 328 U.S. 654 (1946); Baumgartner v. United States, 322 U.S. 665 (1944); Schneiderman v. United States, 320 U.S. 118 (1943).

33. 356 U.S. 86 (1958).

34. 356 U.S. 129 (1958).

In *Trop*, the Court invalidated an attempt by the government to expatriate a wartime deserter from the armed forces.[35] In *Nishikawa*, the Court reviewed the case of a United States citizen who, while temporarily in Japan, was drafted into the Japanese army. Noting that expatriation had not occurred if the service had been involuntary, the majority rejected the government's position that duress was an affirmative defense and that Nishikawa had the burden of overcoming the usual presumption of voluntariness.[36]

Nishikawa and *Trop*, taken together with Warren's strong dissent in *Perez*, seemingly foreshadowed an impending change in the law.[37] In the landmark decision of *Afroyim v. Rusk*,[38] later relied upon by the *Terrazas* court, the Supreme Court in a 5-4 decision specifically overruled its decision made nine years earlier in *Perez*. Because *Afroyim* had such a strong impact on the *Terrazas* court's decision, it is necessary to review the facts and holding of the case.

Afroyim, born in Poland, immigrated to America in 1912 and became a naturalized United States citizen in 1926. Later, after moving to Israel in 1950, Afroyim voted in the 1951 election for the Israeli Knesset, the legislative body of Israel.[39] When Afroyim applied for renewel of his United States passport, the Department of State refused to grant it on the ground that he had surrendered his citizenship by virtue of § 401(e) of the Nationality Act of 1940.[40] In a de-

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35. 356 U.S. 86. Justice Brennan agreed with the majority in *Perez* that there is no constitutional infirmity in § 401(e) of the Nationality Act of 1940, which expatriates the citizen who votes in a foreign political election. He concluded in *Trop*, however, that § 401(g), which provides that a citizen shall lose his nationality by deserting the military in the war, provided he is convicted by court martial, lies beyond the power of Congress to enact. Conceding his apparently paradoxical position, Brennan went on to distinguish the two cases. He argued that while § 401(e) is a means reasonably calculated to insure avoidance of possible embarrassment to United States' foreign relations, expatriation of the wartime deserter is not rationally related to Congress' furtherance of the war effort. "I simply cannot accept a judgment that Congress is free to adopt any measure at all to demonstrate its displeasure and exact its penalty from the offender against its laws."

36. 356 U.S. at 135.

37. For an excellent discussion of the distinguishing factors in *Trop*, *Perez*, and *Nishikawa*, and other relevant cases in the period 1958-1967, *see* Dionisopoulos, *Afroyim v. Rusk: The Evolution, Uncertainty and Implications of a Constitutional Principle*, 55 MINN. L. REV. 235 (1970); *see also*, Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV. 1510 (1960); and Goodtree, *The Denationalization Cases of 1958*, 8 AM. U.L. REV. 87 (1959).

38. 387 U.S. 253 (1967).

39. *Id.* at 254.

40. 54 Stat. 1168 (1940), *as amended by* 58 Stat. 746 (1946 ed.) [re-enacted as § 349(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 267, 8 U.S.C. § 1481(a)(5)].

claratory judgment action brought in federal district court alleging that § 401(e) violated both the due process clause of the fifth amendment and section 1, clause one, of the fourteenth amendment, the district court and the court of appeals held that Congress had the constitutional authority to take away citizenship for voting in a foreign country based on its implied power to regulate foreign affairs.[41]

Emphasizing those cases decided with[42] and since[43] *Perez* invalidating various other statutory sections providing for involuntary expatriation, the *Afroyim* court rejected the idea expressed in *Perez* "that, aside from the Fourteenth Amendment, Congress has any power, express or implied, to take away an American citizen's citizenship without his assent."[44] The Court placed primary importance on the citizenship clause, and, while noting that the clause was chiefly designed to overrule *Dred Scott*,[45] found that it also places a restriction on the government's power to take away citizenship.

> We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this nation against a congressional forcible destruction of his citizenship. . . . Our holding does no more than give to this citizen that which is his own, a constitu-

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41. 387 U.S. at 225. Both Courts relied upon the holding in *Perez*.

42. Trop v. Dulles, 356 U.S. 86 (1958); Nishikawa v. Dulles, 356 U.S. 44 (1958).

43. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) and Schneider v. Rusk, 377 U.S. 163 (1964). In *Mendoza-Martinez*, the plaintiff was born in the United States and thus acquired American citizenship by reason of *jus soli*. Because of his parentage, however, he was also a Mexican citizen under Mexican law through *jus sanguinis*. In this and a companion case, Rusk v. Cort, 372 U.S. 144, 149, the Supreme Court was asked to nullify that section of the Nationality Act whereby petitioners were found to have expatriated themselves by remaining outside the United States to avoid military service. The Court found the pertinent section to be void, "lacking . . . the procedural safeguards which the Constitution demands." 372 U.S. at 186. In *Schneider*, the Court held that § 352(a)(1) of the Immigration and Nationality Act of 1952, which provided that a nationalized citizen loses citizenship by three years of continuous residence in the country of his origin, was violative of due process under the fifth amendment of the Constitution, since no restrictions on the length of foreign residence applied to native born citizens. 377 U.S. at 164-69. For commentary on these and other cases decided in the period 1958-67, *see* Agata, *Involuntary Expatration and Schneider v. Rusk*, 27 U. PITT. L. REV. 1 (1965); Appleman, *The Supreme Court on Expatriation: An Historical Review*, 23 FED. B. J. 351 (1967); Gordon, *Citizen and the State: The Power of Congress to Expatriate American Citizens*, 53 GEO. L.J. 315 (1965); Kramer, *Restraints of Schneider v. Rusk Upon the Foreign Policy Powers of the "Political Branches": How Meaningful Are They?*, 38 TEMP. L. Q. 279 (1965); Scharf, *A Study of the Law of Expatriation*, 38 ST. JOHN'S L. REV. 251 (1964); Note, *Involuntary Loss of Citizenship by Naturalized Citizens Living Abroad*, 49 CORNELL L. Q. 52 (1963).

44. 387 U.S. at 257.

45. 60 U.S. (19 How.) 393 (1857). *See* note 25, *supra*.

tional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.[46]

It is important to focus on *Afroyim* as it relates to the specific intent to relinquish one's citizenship. The Act of 1952 is based on the notion of volition: after listing ten actions that may result in expatriation, § 349(b) of the Act provides that "any person who commits or performs any act specified in subsection (a) shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind . . . ."[47] Thus, some sort of voluntary action would seem to be all that *Afroyim* required. One commentator has argued, however, that "in order to have any significance, *Afroyim* must be read to hold that, although Congress can provide a mechanism by which the individual can voluntarily expatriate himself, volition is now a judicially ascertainable quality, and the government must bear the burden of proving that the citizen's renunciation was truly voluntary."[48]

Although the *Terrazas* court did not mention the 1971 decision of *Rogers v. Bellei*,[49] that case was significant in that it represented a retreat from the principles set forth in *Afroyim*. Bellei was born in Italy in 1939, the son of an American woman and her Italian husband. Thus, Bellei was a United States citizen under the terms of a 1934 law providing that a child born outside the United States to an alien and a citizen was himself a citizen.[50] However, upon pain of loss of his nationality, Bellei was required to live continuously in the United States for five years between the ages of fourteen and twenty-

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46. *Id.* at 263.

47. 8 U.S.C. § 1481(c) (1970). The ten actions set forth in § 349 of the Act include service in a foreign army, taking an oath of allegiance to a foreign state, voting in a foreign election, desertion from the armed services, treason against the United States, obtaining naturalization in a foreign state, formal renunciation of citizenship in the United States, formal renunciation abroad, performing a job or service in a foreign state when the performer either has or acquires that state's nationality, and leaving or remaining outside the United States during either a war or a national emergency for the purpose of evading military service.

48. Schwartz, *supra* note 21, at 1017-18. Thus, Schwartz argues, *Afroyim* makes the statutory presumption of volition rebuttable rather than legally absolute. *Id.* For other commentary on the *Afroyim* decision, *see* Duvall, *Expatriation under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship*, 56 VA. L. REV. 408 (1970); Note, *Acquisition of Foreign Citizenship: The Units of Afroyim v. Rusk*, 54 CORNELL L. REV. 624 (1969); Note, *"Voluntary Relinquishment" of American Citizenship: A Proposed Definition*, 53 CORNELL L. REV. 325 (1968).

49. 401 U.S. 815 (1971).

50. Act of May 24, 1934, ch. 344, 48 Stat. 797 (1954) (re-enacted as § 301(a)(7) of the Immigration and Nationality Act of 1952).

eight.[51] The district court,[52] reviewing Bellei's challenge of the constitutionality of § 301(b) of the Act of 1952,[53] relied on *Afroyim* and *Schneider v. Rusk*[54] in its decision to reinstate Bellei's citizenship. The Supreme Court reversed in a 5-4 decision.

Emphasizing that Bellei's "claim to citizenship [was] wholly, and only, statutory,"[55] the Court concluded that "the first sentence of the Fourteenth Amendment has no application to . . . Bellei. He simply is not a Fourteenth Amendment first sentence citizen."[56] As in *Perez*, the Court deferred to congressional power in the area of foreign affairs, finding that § 301(b)

> reveals a careful consideration by the Congress of the problems attendant upon dual nationality of a person born abroad . . . . The solution to the dual nationality dilemma provided by the Congress by way of required residence surely is not unreasonable. It may not be the best that could be devised, but here, too, we cannot say that it is irrational or arbitrary or unfair.[57]

Justice Black, author of the Court's majority opinion in *Afroyim*, was the principal dissenter in *Bellei*. Rejecting the concept of a hierarchy of citizenship as suggested by the majority, Black believed that "Bellei, as a naturalized American, is entitled to all the rights and privileges of American citizenship, including the right to keep his

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51. 66 Stat. 236 (1952) (re-enacted as § 301(a) of the Immigration and Nationality Act of 1952).

52. Bellei v. Rusk, 296 F. Supp. 1247 (D.D.C. 1969). For a complete discussion of the district court's holding, *see* Note, *Citizen or Expatriate: A Question of Interest*, 5 TEX. INT'L L.F. 284 (1970).

53. *See*, note 51 *supra*.

54. 377 U.S. 163 (1964). *See* discussion, note 43, *supra*.

55. Bellei, *supra* note 49, at 833.

56. *Id.* at 827. "His posture contrasts with that of Mr. Afroyim, who was naturalized in the United States, and with that of Mrs. Schneider, whose citizenship was derivative by her presence here and by her mother's naturalization here. The plaintiff's claim must thus center in the statutory power of Congress and in the appropriate exercise of that power within the restrictions of any pertinent Constitutional provisions other than the Fourteenth Amendment's first sentence." *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898), wherein the Supreme Court, reviewing early English statutes relating to inheritance rights and of citizenship of persons born abroad of parents who were British subjects, concluded that "naturalization by descent" was not a common law concept but was, rather, dependent upon statutory enactment. *Id.* at 668-71. *See also* Weedin v. Chin Bow, 274 U.S. 657 (1927). "[B]irth within the limits of the jurisdiction of the Crown, and of the United States as the successor of the Crown, fixed nationality, and . . . there could be no change in this rule of law except by statute. . . ." *Id.* at 660.

57. *Id.* at 833.

citizenship until he voluntarily renounces or relinquishes it."[58] For Black, then, it was not the place where citizenship was conferred or the residence of the citizen that was dispositive of the citizenship clause's applicability; it was, rather, the act itself of conferring citizenship.[59]

III. VANCE v. TERRAZAS
REAFFIRMATION AND COMPROMISE

Apparently, the Supreme Court in *Bellei* was unwilling to accept the major premise of *Afroyim*, *i.e.* that once granted, an individual's citizenship is beyond any congressional power to divest, without that individual's consent.[60] Thus, *Bellei* raised questions concerning *Afroyim's* continued relevance.

A. The Requirement of Intent

In *Terrazas*, the Secretary of State urged that the court of appeals erred in holding that a specific intent to renounce American citizenship must be proven before the taking of an oath of allegiance could result in an individual's expatriation. His position was that the government need prove only the voluntary commission of an act "that is so inherently inconsistent with continued retention of American citizenship that Congress may accord to it its natural consequences, *i.e.* the loss of nationality."[61] Specifically, the Secretary argued that *Afroyim* did not stand for the proposition that a specific intent to renounce one's citizenship must be shown before that citizenship is relinquished.[62]

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58. *Id.* at 844. Black goes on to argue that "[T]he Court today puts aside the Fourteenth Amendment as a standard by which to measure congressional action with respect to citizenship, and substitutes in its place the majority's own vague notions of 'fairness' . . . . While I remain on the Court I shall continue to oppose the power of judges . . . to change the Constitution from time to time according to their notions of what is 'fair' and 'reasonable'. I would decide this case not by my views of what is 'arbitrary', or what is 'fair', but rather by what the Constitution demands." *Id.*

59. Schwartz, *supra* note 21, at 1024. For additional commentary on *Bellei* and related materials, *see* Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369 (1973).

60. 401 U.S. at 835.

61. 444 U.S. at 259 (citing to Brief for Appellant 24).

62. *Id.* The Secretary further proposed that the dissent in *Perez*, and the majority opinion in *Afroyim*, spoke only to conduct so contrary to undivided allegiance to the United States that it could result in loss of one's citizenship without regard to intent and therefore that "assent" should read as a 'code word' for intent to renounce. *Id.* at 260.

The Court, however, read *Afroyim* differently. Pointing out the language in *Afroyim* emphasizing that loss of nationality requires the individual's "assent",[63] the Court felt it "difficult to understand that 'assent' to loss of citizenship would mean anything less than an intent to relinquish citizenship, whether the intent is expressed in words or is found as a fair inference from proven conduct."[64] The Court conceded that any of the expatriating acts specified in § 349(a) may be highly persuasive evidence of a person's purpose in abandoning his citizenship, but went on to say that the "trier of fact must in the end conclude that the citizen . . . intended to relinquish his citizenship."[65]

Chief Justice Warren's dissent in *Perez* seems to have greatly influenced the *Terrazas* court's reasoning as to intent. Warren admitted that under some circumstances an act such as voting in a foreign election would undoubtedly have the effect of showing a voluntary abandonment of citizenship.[66] He argued, however, that Congress had employed a classification so overbroad that it encompassed conduct failing to show a voluntary abandonment of citizenship.[67] In support of his position he offered the example of a decision of a former attorney general holding an American citizen to have lost her citizenship by voting in a Canadian town election on the issue of whether beer and wine should be sold.[68] Clearly, "voting in a foreign election may be a most equivocal act, giving rise to no implication that allegiance has been compromised."[69] Warren maintained that the particular facts of each case must be carefully scrutinized in order to determine whether there had truly been the "embarrassment of the government" that the *Perez* majority seemed so concerned about.

The *Terrazas* Court also gave considerable import to the language of the Constitution. The intent of the fourteenth amendment,

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63. *Id.* at 259-60 (citing *Afroyim*, 387 U.S. at 257).

64. *Id.* at 260.

65. *Id.* at 261 (citing *Nishikawa* v. *Dulles*, 356 U.S. 86 (1958)).

66. 356 U.S. at 44 (Warren, C.J., dissenting). For example, abandonment of one's citizenship could very well result if the individual desiring to vote in a foreign election had to become a foreign national or represent himself to be one. *Id.* Further, there might be circumstances where a United States citizen shown to have voted at the behest of a foreign sovereign to advance its own territorial interests would compromise his native allegiance. *Id.* at 76.

67. *Id.* at 76. Warren is arguing here that a statutory presumption cannot be maintained if there exists no rational connection in common experience between the fact proved and the ultimate fact presumed. He cites in support Manley v. Georgia, 279 U.S. 1, 7 (1928), Tot v. United States, 319 U.S. 463 (1943), Bailey v. Alabama, 219 U.S. 219 (1911).

68. *Id.* at 77 (citing In The Matter of F _____ , 2 I. & N.Dec. 427).

69. *Id.*

they noted, was to define citizenship. Thus, that definition could not co-exist with a Congressional power to specify acts resulting in the renunciation of citizenship absent an intent to renounce. "In the last analysis, expatriation depends on the will of the citizen, rather than on the will of Congress and its assessment of his conduct."[70] The importance of the Court's findings as to intent appears immense. The Court has, for the first time, clearly mandated that which was only hinted at in *Afroyim*. In the future, the record must support a finding that a particular expatriating act was accompanied by a specific intent to terminate one's United States citizenship.[71]

The Court seems to stop short, however, of returning to the absolute standard set forth in *Afroyim*. First, though the factual setting differs considerably from that in *Terrazas*, the *Terrazas* court makes no mention of its decision in *Rogers v. Bellei*.[72] *Bellei* suggested that the "Necessary and Proper" theory of denationalization, which, as was noted, went virtually unchallenged until *Afroyim*, might be re-emerging.[73] In spite of its frequent reference to *Afroyim's* rhetoric concerning the fourteenth amendment, the *Terrazas* court's silence as to *Bellei* may imply a continuing hesitation in accepting *Afrovim's* major premise. The question remains open as to whether the distinct class of citizen suggested by *Bellei* still exists: a class to which the "Fourteenth Amendment has no application. . . ."[74]

B. The Status of the 'Preponderance of the Evidence' Standard

Further evidence of the Court's reluctance to return to the absolute standard of *Afroyim* is found in that portion of the opinion concerning evidentiary standards. The court of appeals found Congress to

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70. 444 U.S. at 260.

71. *Id.* at 263.

72. 401 U.S. 815 (1971). Brennan does refer briefly to *Bellei* in a footnote to Part II of his dissent. He simply notes that Bellei's citizenship was not based upon the fourteenth amendment, and that the issue before the Court was whether Bellei could lose his statutorily created citizenship for failure to satisfy a condition subsequently contained in the same statute that accorded him citizenship. 444 U.S. at 270, (Brennan, dissenting).

73. Schwartz, *supra* note 21, at 1027. "In a subtle fashion, the Burger Court reintroduced (in *Bellei)* for debate two important questions. The proposition that, since Congress was under no Constitutional obligation to grant Bellei citizenship, the citizenship thus conferred was only a 'watered-down' version of the citizenship possessed by those born in the United States, simply re-states the discredited right-privilege dichotomy. The alternative is that the proper question is not whether Bellei had a constitutional right to become an American citizen, but whether, as a citizen, he had the same right to live abroad that all native-born citizens had." *Id.*

74. 401 U.S. at 827.

be without constitutional authority to prescribe the standard of proof in expatriation proceedings, and held that the proof in such cases must be by clear and convincing evidence. Upholding the validity of § 349(c) of the Act which provided for a preponderance of the evidence standard, the Supreme Court disagreed with the court of appeals' conclusions.

To support its findings, the Court was forced to retreat from its prior position taken in *Nishikawa v. Dulles*,[75] and thus justify the standard subsequently set by Congress in § 349(c). Faced with the loss of his United States citizenship under § 401(c) of the Nationality Act of 1940, Nishikawa, a United States born citizen, contended that the government was required to prove that his service during a temporary visit to Japan was not involuntary.[76] Noting that Nishikawa had been conscripted in a totalitarian state to whose conscription law, with its severe penal sanctions, he was subject, the Court held that the issue of voluntariness had been "adequately injected . . . (thus) requiring the Government to sustain its burden of proving voluntary conduct by clear, convincing and unequivocal evidence."[77]

In support of their belief that § 349(c) was, evidently, aimed to supplant the evidentiary standard prescribed by *Nishikawa*, the *Terrazas* majority cited extensively to the Act of 1952's legislative history. The House Report accompanying § 349(c) stated that "in order to forestall further erosion of the statute designed to preserve and uphold the dignity and priceless value of U.S. citizenship . . . § 349(c) sets up rules of evidence under which the burden of proof to establish loss of citizenship by a preponderance of the evidence would rest upon the Government."[78] The Court emphasized further that the *Nishikawa* ruling did not purport to be constitutional in nature,[79]

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75. 356 U.S. 129 (1958).

76. *Id.* at 132. The interesting facts of *Nishikawa* invite closer scrutiny. The petitioner was born in California to Japanese parents. Upon graduation with a degree in engineering from the University of California in 1939, he went to Japan. As required by the Japanese government, he took a physical examination, and in March of 1941 he was inducted into the Japanese army. The petitioner testified that Japanese law provided for imprisonment for draft evasion, and that rumors he had heard about the brutality of the Japanese secret police made him afraid to make any protest. During the war, he served as a mechanic/maintenance man in a Japanese Air Force regiment in China, Indo-China, the Philippines and Manchuria. The petitioner alleged that because of an opinion he expressed to a group of officers that there was no chance of winning the war, he was frequently beaten. He even won the nickname "America". *Id.*

77. *Id.* at 136-37.

78. 444 U.S. at 265 (citing to H.R. Rep. No. 1086, 87th Cong., 1st Sess. 40, 41 (1961).

79. 356 U.S. at 130. "We need not in this case consider the constitutionality of Section 401(c)." *Id.*

though it did concede that the *Nishikawa* court had evinced a decided preference for requiring clear and convincing evidence to prove expatriation.

The *Afroyim* standard was also found to be not inconsistent with the idea of Congress as being constitutionally devoid of power to impose expatriation on an individual absent his assent. The Court urged, however, that it does not follow that Congress is also without power to prescribe the evidentiary standards governing expatriation proceedings.[80] "[S]urely the [*Afroyim*] Court would have said so had it intended to construe the Constitution to exclude expatriation proceedings from the traditional power of Congress to prescribe rules of evidence and standards of proof in the federal courts."[81]

Justices Marshall and Stevens dissented from this portion of the majority's holding. Marshall found the Court's discussion of congressional power to prescribe standards of proof to be "the beginning, not the end, of the inquiry."[82] It therefore remained the task of the Court to determine whether those rules and standards impinged on one's constitutional rights. Particularly troublesome to Marshall was the Court's apparent reliance on the civil nature of expatriation proceedings; proceedings which the majority said "do not threaten a loss of liberty."[83] This casual dismissal of United States citizenship, Marshall urged, cannot withstand scrutiny, for "the mere fact that one who has been expatriated is not locked up in a prison does not dispose of the constitutional inquiry."[84]

Clearly, the majority of the Court appears confused, for as Stevens points out, "such reasoning construes the constitutional concept of 'liberty' too narrowly."[85] On the one hand the Court speaks of the dignity and priceless value of American citizenship. Yet, many would consider the loss of one's citizenship to be at least as regrettable as the loss of 'liberty' resulting from criminal proceedings.

The answer seems to rest with the Court's desire to effect some manner of compromise. The Court emphasizes the heavy burden placed upon Congress by requiring the ultimate finding that an individual has commited an act with the specific intent to renounce his

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80. 444 U.S. at 265.

81. *Id.* at 266. The court noted that this power is rooted in article 1, § 8, cl. 9 of the Constitution, creating the inferior federal court system. *See, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31 (1976); Hawkins v. United States, 358 U.S. 74 (1958); Tot v. United States, 319 U.S. 463 (1943).

82. 444 U.S. at 270 (Marshall, concurring in part, dissenting in part).

83. *Id.* at 266.

84. *Id.* at 270 (Marshall, concurring in part, dissenting in part).

85. *Id.* at 272. (Stevens, concurring in part, dissenting in part).

citizenship. Surely, then, "since Congress has the express power to enforce the Fourteenth Amendment, it is untenable to hold that it has no power whatsoever to address itself to the manner or means by which Fourteenth Amendment citizenship may be relinquished."[86]

C. The Presumption of Voluntariness

Based upon its holding that neither the citizenship clause nor *Afroyim* placed expatriation proceedings beyond the congressional power to prescribe rules of evidence in federal courts, the majority also concluded that the presumption of voluntariness provided for in § 349(c) is not constitutionally infirm. The Court points out an important distinction that must be noted. While § 349(c) provides that any of the expatriating acts set forth in § 349(a) are presumed to have been committed voluntarily, the section does not also require the presumption that such act has been performed with the specific intent to relinquish citizenship. That matter remains the burden of the government to prove by a preponderance of the evidence.[87]

Again the Court relied on the legislative history behind the enactment, subsequent to *Nishikawa*, of § 349(c): "[section] 349(c) . . . makes clear that Congress preferred the ordinary rule that voluntariness is presumed and that duress is an affirmative defense to be proved by the party asserting it." And neither Marshall nor Stevens appear to find fault with this portion of the majority's holding. Perhaps even they were willing to concede that Chief Justice Warren's conception of "actions in derogation of undivided allegiance to this country . . . "[88] would seem to contain an element of assent. Of primary importance, however, was the Court's apparent willingness to defer to Congress on matters seen to be within its competence.

The majority only hinted, in their conclusion as to the preponderance of evidence standard, at their desire to effect some sort of compromise with Congress. In discussing their decision concerning the presumption of voluntariness, however, they leave little doubt as to their intent. "To invalidate the rule here would be to disagree

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86. *Id.* at 266.

87. Section 349(c) provides in relevant part that "any person who commits or performs, or who has committed or performed, any act of expatriation under this chapter or any other act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily."

88. 444 U.S. at 261. Discussion of Chief Justice Warren's dissent in Perez v. Brownell, 356 U.S. 44, 69 (1958) implying that defendant's actions by their very nature would entail the element of assent.

flatly with Congress on the balance to be struck between the interest in citizenship and the burden the Government must assume in demonstrating expatriating conducts."[89]

IV. CONCLUSION

In *Afroyim v. Rusk* the Supreme Court declared that American citizenship was an absolute right. The government of the United States could not forcibly deprive an American of his nationality. Yet *Afroyim* created complex questions and it remained to be seen whether the Court could continue on the libertarian course it had set.

The decision in *Terrazas* does, clearly, indicate continued support for those principles espoused in *Afroyim*. The Court has even enlarged upon *Afroyim* in holding the establishment of a specific intent to relinquish one's citizenship to be an absolute requirement in expatriation proceedings.

Further, the Court appears to have struck a fair balance between the need to protect the ideals of the fourteenth amendment and congressional power to prescribe rules of evidence and standards of proof in the federal courts. True, the clear and convincing standard of *Nishikawa* would better insure the protection of an individual's fourteenth amendment rights. But, as stated previously, it would be "untenable to hold that (Congress) has no power whatsoever to address itself to the manner or means by which Fourteenth Amendment citizenship may be relinquished."[90]

The *Terrazas* decision is not without its troubling aspects. Of particular concern is the Court's statement that "expatriation proceedings . . . do not threaten a loss of liberty."[91] Clearly, the Court is inconsistent in its emphasis on the civil nature of expatriation proceedings. The loss of one's nationality may be of greater consequence than punishment received in a criminal proceeding, for "citizenship, like freedom of speech, press, and religion, occupies a preferred position in our written Constitution, because it is a grant absolute in terms."[92]

The Court, however, is not unaware of the preferred position of United States citizenship under the Constitution. Rather, the *Vance v. Terrazas* decision reveals an attempt by the Court to balance the rights conferred by the Constitution on its citizens with the interests

89. *Id.* at 269-70.

90. *Id.* at 266. The court agreed with Mr. Justice Black's concurring decision in Nishikawa v. Dulles, 356 U.S. 139 (1958).

91. *Id.* at 266.

92. 356 U.S. at 84 (Warren, C.J. dissenting).

of the government. Indeed, the Court in *Terrazas* has, in its holding, echoed the words of Chief Justice Warren written twenty-two years ago: "One . . . may be a good citizen or a poor one. Whether his actions be criminal or charitable, he remains a citizen for better or for worse, except and unless he voluntarily relinquishes that status. While Congress can prescribe conditions for voluntary expatriation, Congress cannot turn white to black and make any act an act of expatriation."[93]

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93. *Id.*

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